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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1379

WALTER HUMPHREY, DONALD V. MALONE, ROBERT KALWAT and MARION A. SACKSTEDER, *Petitioners,*

v.

DEALERS TRANSPORT COMPANY

and

E & L TRANSPORT COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINIONS BELOW

The original opinion of the District Court of August 10, 1965, denying a Motion to Dismiss, is reported at 59 LRRM 3020, and is reprinted as App. A, pp. 1a-6a, *infra.* The opinion of the District Court of October 19, 1967, dismissing the complaint, is not reported;

it is reprinted as App. B, pp. 7a-14a, *infra*. The Court of Appeals wrote no opinion. Its order is unreported and is reprinted as App. C, p. 15a, *infra*.

JURISDICTION

The order of the Court of Appeals was entered on January 10, 1969. On April 1, 1969, Mr. Justice Stewart granted leave to file this petition on or before May 9, 1969. This Court has jurisdiction under 28 U.S.C. § 1254(1) .

QUESTIONS PRESENTED

1. Whether it is compatible with Section 301 of the Labor Management Relations Act, 1947, to deny recovery to victims of a breach of contract on the theory that they are required to establish that the injury would not have occurred but for the breach?

2. Whether non-performance of obligations affirmed in *Humphrey* v. *Moore*, 375 U.S. 335, is excused by the state court injunction, therein reversed, although the employer-obligor was not free of contributory fault?

STATUTE INVOLVED

This case involves the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 141, *et seq.* (hereinafter referred to as the "Act"), and particularly §§ 8(d) and 301(a) thereof, which provide in pertinent part as follows:

> Section 8(d) "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to

wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, * * *". 61 Stat. 140; 29 U.S.C. § 158(d))

Section 301(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (61 Stat. 156; 29 U.S.C. § 185)

STATEMENT OF THE CASE

Petitioners, the prevailing parties in *Humphrey* v. *Moore,* 375 U.S. 335, return to this Court to secure redress for violation of rights there declared. The underlying facts giving rise to the present action were fully described in this Court's opinion (id., at 336-341). Only a synopsis is necessary here.[1]

A. The Relevant Facts

Dealers Transport Co. and E & L Transport Co. were both engaged in transporting new automobiles from the Ford Motor Company plant in Louisville, Kentucky. When they were informed by Ford that there would be room for only one, Dealers and E & L entered into an arrangement whereby "E & L would

[1] The transcript of record in this Court in the prior litigation is also part of the present record. Facts relied on in this petition, but not stated in this Court's prior opinion, are also, of course, found in the record which was before the District Court at the time it entered its order dismissing the complaint and before the Court of Appeals in the Appendix to Plaintiffs-Appellants Brief below, cited herein as "App.".

sell to Dealers its 'secondary' authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities." (*Id.* at 336-337; see also App. 88a).

Both employers were parties to a collective bargaining agreement with the International Brotherhood of Teamsters covering a multi-employer, multi-local union, bargaining unit. Under Section 5 of that agreement, the obligation of Dealers to integrate or dovetail E & L's Louisville employees on its own Louisville seniority roster depended on whether Dealers would be deemed to have "absorbed" E & L's Louisville business (see *id.*, at 348).

In response to "inquiry from E & L," the Local Union President, Priddy, received information "from the company" which led him to understand "that the transaction between the companies involved no trades, sales or exchanges of properties but only a withdrawal of E & L at the direction of the Ford Motor Company." (*Id.* at 337, 348). Priddy "consequently advised the E & L employees that their situation was precarious" (*id.*); when they nonetheless filed a grievance, the Union advised the Dealers' employees that they had "nothing to worry about" (375 U.S. at 340), since, as the Union understood the circumstances, the E & L employees would have no rights under the contract.

Subsequently, when the Union discovered from the Federal Register that Dealers was acquiring E & L's operating authority and that other locations were in-

volved in the transaction,[2] Priddy decided that the matter was one for decision by the Joint Conference Committee. (*Id.* at 348). Before the Committee, Priddy, by now of the view that there was an absorption, supported petitioners. On or about October 18, 1961, the Committee entered an award in petitioners' favor, directing that E & L employees "be sandwiched in on master seniority boards using the presently constituted seniority lists and dates contained therein * * *" (*id.* at 339, App. 10a-11a).

Dealers' employees then brought the state court action which ultimately came here as *Humphrey* v. *Moore*. Their claim was that *the Union* had been guilty of fraud and breach of its duty of fair representation. Their complaint in this respect was predicated upon Priddy's assurances to the Dealers' employees that they had "nothing to worry about." (*Id.* at 340; Tr. Nos. 17 and 18, Oct. Term, 1963, pp. 3, 6). They sought and obtained temporary and permanent injunctions against implementation of the award. Dealers did not oppose the granting of these injunctions; indeed, when the case came to this Court, Dealers did not support the decision of the Joint Committee; it urged rather that the decision of the Joint Committee be discarded and the matter be submitted to arbitration (375 U.S. at 343, n. 3).

On January 6, 1964, this Court held that the Joint Committee's award in favor of petitioners was "final and binding upon the parties, just as the contract says

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[2] The Union became aware of the trade of operating authorities only as notices of ostensibly independent transfers appeared at intervals in the Federal Register, on August 9, August 30 and October 11, 1961 (App. pp. 71a-72a, 119a-120a; Exs. 2, 3, 4).

it is" (*id.* at 351) and reversed the injunction which had been entered by the Kentucky Court of Appeals.

During the period of over two years in which the state court injunctions were in effect, petitioners had been deprived of the employment to which they were entitled under the Joint Conference Committee award. They therefore brought the present Section 301 damage suit against both Dealers and E & L.

With respect to the joint liability of respondents, the complaint alleged:

> "Prior to October, 1961, defendants Dealers and E & L conspired to and did fraudulently conceal from plaintiffs' exclusive bargaining agent the agreement whereby E & L would sell to Dealers its 'secondary' authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities. The purpose and effect of the aforesaid fraudulent concealment, was to defeat and prevent plaintiffs' exercise and enjoyment of employment rights arising from and under Article 5 of the contract * * *". (App. p. 12a)

Both respondents were thus charged with breach of contract by deliberately concealing material facts from the Union, petitioners' agent. Dealers individually was charged, moreover, with breach by failure to implement the award during the period of the state court injunctions. Petitioners contended that the injunction did not excuse the breach because (1) respondents' fraudulent concealment was a contributory cause

of the injunction; (2) "Dealers instigated, supported and assisted its own employees to resist * * * the exercise and enjoyment of plaintiffs' rights pursuant to the decision" of the Joint Conference Committee; and (3) Dealers "acquiesced in and supported and failed to take steps legally open and available to it to set aside the injunction * * *" (App. 12a).

The predicate of petitioners' claim that respondents had fraudulently concealed facts material to the "absorption" issue, and that it was this concealment which evoked Moore's charge of fraud and bad faith against the Union, is stated in *Humphrey* v. *Moore:*

> "Priddy's early assurances to Dealers employees were not well founded, it is true; but Priddy was acting upon information then available to him, information received from the company which led him to think there was no trade or exchange involved, no 'absorption' which might bring § 5 into play." 375 U.S. at 348, see also, *id.* at 337.

Evidence subsequently uncovered by petitioners during the discovery proceedings below, and called to the District Court's attention in petitioners' objections to respondents' proposed findings, further supports the allegations of fraud. This evidence at the very least strongly suggests that during their negotiations in June, 1961, Dealers and E & L had agreed that Dealers would not integrate E & L's Louisville employees on Dealers' seniority list, but recognized that, under Joint Committee precedent, its obligation to integrate would turn on "whether or not anything would be considered as having been purchased" (App. pp. 83a-84a, 93a-94a, 97a, 109a) "so as to make it an absorption" (App. p. 109a). *Both* employers thereupon misrepresented *to the Union and to their employees* that there

had been "no trades, sales or exchanges of property, but only a withdrawal by E & L at the direction of the Ford Motor Company" (App. pp. 18a; 82a-86a; see 375 U.S. at 337). Petitioners' theory was that the purpose of these misrepresentations was to dissuade the E & L employees from claiming absorption rights under Articles V and to dissuade the Union from asserting such right.

Further, and contrary to the unsupported "finding" below (App. p. 33a), that "all of the facts were subsequently known and were timely presented to the Joint [Conference] Committee at Detroit,"[3] Dealers' representation to that Committee that only intangible property—i.e., operating authority of unascertainable value —was being transferred (App. pp. 83a-84a, 98a-99a, 102a, 106a-107a) was false and fraudulent. Moore's attack upon the Joint Committee's authority was grounded on Dealers' representation to the Committee that there was "no sale of tangible assets at" Louisville. 375 U.S. at 346. Discovery established that E & L had contracted to sell to Dealers at book value its stock in Auto Releasing Company of Louisville, a non-carrier corporation set up for the purpose of handling the release of Ford trucks from Louisville assembly plant to the Louisville carrier, and Dealers had contracted to sell to E & L at 125% of book value its stock in Auto Releasing Company

[3] The record in *Humphrey* v. *Moore* provides no support for this finding. The Chancery Court there found (App. p. 53a) that "*no contention is made that* the pertinent facts with respect to this proposed 'merger' or 'absorption' of routes were not truthfully disclosed to the committee," but this was only in response to the claim of Dealers' employees that *their* interests had not been fairly protected. It was solely in this context that this Court considered the matter. 375 U.S. 335, 350-351.

of Lorain (App. pp. 90a-92a, 122a, 128-129a). This transaction was an integral part of the exchange of territories. Since the stock of these companies had a fixed value, revelation of the interrelated stock sales would have doomed the thesis that there was no "absorption" because only operating authorities were being exchanged. The Releasing Company exchange did not appear in the Federal Register notices; *only those facts which had been published (and were thus known to the Union) were disclosed to the Committee.* Thus, the Companies compounded their initial concealment of information from the Union and from the employees with an attempt to mislead the tribunal which they had agreed to empower to determine whether there had been an "absorption."

While respondents disputed the characterization of fraud, they admitted that vital facts were deliberately withheld from the Union prior to the Joint Committee meeting in Detroit. Snipes (App. 87a) was the leading figure in the transaction on behalf of Dealers. On deposition, he replied to the question "Why didn't you tell them any more?" than had appeared in the Federal Register: "Why should I?" (App. p. 115a).

B. The Proceedings Below

Petitioners' complaint was filed January 20, 1964. Thereafter, both respondents filed motions to dismiss the complaint for failure to state a claim on which relief could be granted. The issues on these motions were fully briefed. On August 10, 1965, the District Court entered an order denying the motions to dismiss, in an opinion which is reprinted herein at pp. 1a-6a, *infra.*

Petitioners then commenced pre-trial discovery, taking depositions pursuant to Rule 30, F.R.C.P. At a pre-trial conference on March 1, 1966, the Court stated that the case would be tried at the October, 1966, term (App. pp. 29a-30a). On September 20, 1966, the Court wrote a letter to counsel, stating that because of recent illness it would be impossible for him to try any jury cases before the October, 1967, term and suggesting that trial by jury be waived.

On July 11, 1967, the Court ordered another pre-trial conference which was held on August 30, 1967 (App. p. 30a). No motion for decision on the merits by either party was before the Court. The Court, however, rendered an oral opinion and directed defendants to submit findings of fact and conclusions of law and tender judgment in accordance with that opinion within ten days. The Court granted plaintiffs ten days to respond or file objections to defendants' proposal. On September 1, the Court entered an order embodying the foregoing directions (App. pp. 21a-32a). Defendants submitted proposed findings of fact and conclusions of law and petitioners filed objections thereto. On October 19, 1967, the District Court entered an order adopting, in toto, the findings of fact and conclusions of law which had been tendered by defendants and dismissing the action (App. B, pp. 7a-14a, *infra*). On January 10, 1969, the Court of Appeals affirmed on the findings and conclusions which had been adopted by the District Court (App. C, p. 15a, *infra*).

The operative holdings proposed by respondents and adopted by the courts below are as follows:

> "Plaintiffs' contention that there would not have been an injunction nor any law suit had it not been for the antecedent fraud of the de-

fendants is a very speculative and tenuous theory that pyramids inference upon inference. If the Joint Committee decision was fair, as the Supreme Court has held, then surely all that took place afterwards cannot be blamed upon the alleged antecedent fraud." (App. B, p. 11a, *infra*).

"As a result, the plaintiffs were in no way misled by said fraud, they did not rely to their detriment on said statements, and any possible adverse effects said fraud could have had were cured by the full hearing that was held at Detroit and whose decision was found by the Supreme Court to be fair and equitable." (App. B, p. 13a, *infra*).

"The alleged antecedent fraud of the defendants was not responsible for the law suit that was filed by Dealers employees. It would be stretching the imagination to rule as a matter of law that but for said alleged fraud no law suits would have been filed." (App. B, p. 13a, *infra*).

"Even if plaintiffs' theories of fraud and misrepresentation were deemed actionable, this Court finds that as a matter of law no damages will lie for the period of delays during which the injunction of the Court of Appeals was in effect." (App. B, p. 14a, *infra*).

REASONS FOR GRANTING THE WRIT

I. BY REQUIRING VICTIMS OF BREACH OF CONTRACT TO PROVE THAT THEY WOULD NOT HAVE BEEN INJURED BUT FOR THE BREACH, THE DECISION BELOW DEBILITATES SECTION 301.

In dismissing plaintiffs' action before trial because it could not "rule as a matter of law that but for said alleged fraud no law suit would have been filed", the court below established a rule which rewards fraud by frustrating its victims, and thereby defeats the object of § 301(a)—to assure good faith performance

of contractual commitments, which is one of the central objectives of the national labor policy. See, *e.g.*, *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 454, 456-457; *Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 509.

The question whether the beneficiary of a collective bargaining agreement must establish that a particular injury would not have occurred but for the breach, is one of general importance in fashioning the substantive law of § 301; it is particularly significant in the present context where the breach consists of concealment of that which respondents were obliged to disclose, not only by the implied covenant of good faith and fair dealing which inheres in every contract,[4] but by the express provisions of §§ 8(a)(5) and 8(d) of the Act[5] which "are part of the federal law of labor agreements". *NLRB* v. *C & C Plywood Corp.,* 385 U.S. 421, 430. See also *Textile Workers* v. *Lincoln*

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[4] The common-law principle that a covenant of good faith and fair dealing inheres in every contract, applies with even greater force in the law of collective bargaining agreements. See *Local 1912, International Association of Machinists* v. *U. S. Potash Company,* 270 F.2d 496, 498 (C.A. 10), following 3 Williston, *Contracts,* (Rev. Ed. 1936), § 670; *United Steelworkers* v. *New Park Mining Company,* 273 F.2d 352, 356 (C.A. 10). For here, the parties' relationship is not wholly consensual; rather, each fulfills a role imposed upon it by statute in furtherance of a national policy whose objective is industrial peace. See *United Steelworkers* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 580; *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 550. Since neither party can perform its assigned task without knowledge of material facts, the duty to provide information is necessarily an element of the statutory duty to bargain.

[5] *NLRB* v. *Acme Industrial Corp.,* 385 U.S. 432, 435-436.

Mills, 353 U.S. at 454, 456-457; *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270, 279.[6]

While the question may be one of first impression under § 301, the problem is familiar elsewhere in the law, and the universal resolution is diametrically opposite to that of the courts below herein. The law imposes upon the wrongdoer—particularly where he has contravened a statutory policy—the burden of establishing that his wrong *could not have* contributed to the injury. As long ago as *The Pennsylvania,* 19 Wall. (86 U.S.) 125, this Court rejected the proposition that one cannot recover for a wrong unless he can establish that the injury would not have occurred if the wrong had not been committed.

> "Concluding, then, as we must, that the bark was in fault, it still remains to inquire whether the fault contributed to the collision, whether *in any degree* it was the cause of the vessels coming into a dangerous position. It must be conceded that *if it clearly appears the fault could have had nothing to do with the disaster,* it may be dismissed from consideration. The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, *it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary*

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[6] Thus, the answer to Snipes' question, "Why should I" (p. 9, *supra*), is, "The law commands it."

to enforce obedience to the mandate of the statute." (19 Wall. at 136, emphasis supplied).[7]

The same principle was applied to labor legislation at the last Term of this Court. *Wirtz* v. *Hotel Employees,* 391 U.S. 492, construed § 402(c) of the Labor-Management Reporting and Disclosure Act of 1959, which provides that a court can set aside an election for union officers only if the violation of § 401 "may have affected the outcome" of the election. The Court held that the effect of the violation was to establish a *prima facie* case that the violation "may have affected the outcome" within the meaning of § 402, but that this "effect may of course be met by evidence which supports a finding that the violation *did not affect the result.*" (*Id.* at 506-507, emphasis supplied). A conclusion that the outcome was *not* affected must rest on "tangible evidence," not mere "conjecture"

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[7] Here, the courts below said (App. 11 (a), *infra*), "Plaintiffs' contention that there would not have been an injunction nor any law suit had it not been for the antecedent fraud of the defendants is a very speculative and tenuous theory that pyramids inference upon inference." *The Pennsylvania* answers conclusively: "If it be said that this is speculation, it may be admitted; but this is a speculation rendered necessary by a certain fault of the bark." 19 Wall. at 137. So here, "speculation" whether Moore would have sued absent respondent's representations on which Priddy relied in advising the employees becomes necessary only because of the certain fault of defendants—their concealment of material facts from Priddy.

The Pennsylvania was followed in *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, the Court saying:

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Id.* at 265.

See also, *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U.S. 690, 697, text and note at n. 7.

(*Id.* at 508).[8] In view of the "difficulty of proving" that violations actually did affect the outcome, this construction was necessary "in order to avoid rendering the proposed 'remedy practically worthless'" (*Id.* at 506).

But *Hotel Employees, supra,* is far from the first case which has adapted the principle articulated in *The Pennsylvania* to the area of labor relations. Early in the administration of the National Labor Relations Act, Judge Learned Hand wrote:

> "We have assumed hitherto that the strike here in question was only for the purpose of enforcing the union's power to negotiate for all the men. That is not true; there had been a wage dispute, and, *the men's inability to get at the truth of the Elmira business was another cause.* It is of course possible that the parties might have split over wages, or over the Elmira plant, even if the respondent had negotiated with the Joint Board. But since the refusal was at least one cause of the strike, and was a tort—a 'subtraction'—it rested *upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune.* Since it cannot show that the negotiations, if undertaken, would have broken down, it cannot say that the loss of the men's jobs was due to a controversy which the act does not affect to regulate." *NLRB* v. *Remington Rand, Inc.,* 94 F. 2d 862, 872 (C.A. 2). (Emphasis supplied.)

By parity of reasoning, since, as the complaint in *Humphrey* v. *Moore* shows, p. 5, *supra,* Priddy's as-

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[8] Findings 8, 9, 10, 14, 15, and 17, adopted by the courts below (App. 10(a)-14(a)), embody precisely the kind of reasoning which this Court characterized in *Hotel Employees* (*id.* at 508), as "pure conjecture."

surances to the Dealers' employees were relied on in the bringing of that law suit, respondents "cannot say" that their misrepresentations to Priddy "could not" have been "a cause" of Moore's suit.

Even more closely in point is *Garment Workers* v. *Labor Board,* 366 U.S. 731, 737. In that case, an employer had entered into an exclusive recognition agreement with the Union in the belief that it possessed the requisite majority of employees. The Union argued that even though, as it subsequently developed, it represented only a minority, so that the exclusive recognition provision was illegal, the remainder of the agreement should be continued in force. This Court rejected the argument:

> "On the facts shown, the agreement must fail in its entirety. It was obtained under the erroneous claim of majority representation. *Perhaps the employer would not have entered into it if he had known the facts.*" (Emphasis supplied). *Id.* at 737.

So here, it is quite enough to establish liability that "perhaps" *Moore et al.* would not have brought suit if they "had known the facts" from the beginning.

In short, the law places upon the *wrongdoer* the burden of *proving,* by evidence, not speculation, that the injury *would have occurred* absent the illegal action; and that rule is particularly Apposite where, as in *The Pennsylvania,* "it is necessary to enforce obedience to the mandate of a statute". Indeed, the rule is indispensable where the statute commands disclosure. For if the violation is concealment, "a substantive inquiry after the fact cannot possibly suc-

ceed in accurately ascertaining retrospectively" what a person would have done if he had had certain information when he was entitled to it. Compare, *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 365, n. 18.[9] If parties to a collective bargaining agreement can escape liability for withholding information because the victim is unable to demonstrate what would have happened, had he but known, it would "place a premium on concealment * * * [and] jeopardize the salutary policies of [§ 301]." Cf. *Wolf* v. *Weinstein,* 372 U.S. 633, 654.

The decision below clearly warrants certiorari if only because it cripples the enforcement of § 301. But the problem is a more general one, and is indeed presently before this Court in the context of another statute which requires disclosure. In *Mills* v. *Electric Autolite Company,* No. 1133, Oct. Term 1968 (cert. granted, April 21, 1969, 37 U.S. L. Wk. 3399), this Court agreed to review a decision of the Seventh Circuit which held that minority stockholders were not entitled to any remedy for misrepresentations in a proxy statement authorizing a merger unless the misleading statements caused the voters to approve the merger. Compare *Wirtz* v. *Hotel Employees, supra.* Petitioners in *Mills* argue that to inject this speculative issue into the litigation is to frustrate the disclosure policy of the Securities and Exchange Act of 1934, 15 U.S.C. § 78, n (a). The present case presents a parallel question under § 301 of the Labor-Management Relations Act of 1947. Indeed, petitioners' case

[9] *Silver* was followed by *Greene* v. *United States,* 376 U.S. 149, 162 which held that the law is reluctant to condition "restitution on a retroactive determination" that the injury would have occurred even if the wrong had not been committed.

here is far stronger, for the Seventh Circuit in *Mills* at least accorded the plaintiffs a trial on the issue, and placed the burden of proof of non-causation on the defendant. To that extent, the decision below is clearly in conflict with the Seventh Circuit's decision in *Mills,* just as both decisions are in conflict with the philosophy of *The Pennsylvania.*

II. IN HOLDING THE INJUNCTION A BAR TO RECOVERY OF DAMAGES, THE DECISION BELOW DISTORTS THIS COURT'S PRIOR DECISION AND CONFLICTS WITH SETTLED PRINCIPLES OF CONTRACT LAW.

The award of the Joint Conference Committee directed Dealers to "sandwich" petitioners into the seniority list within thirty days. Dealers failed to do this, but the courts below held its failure excused by the Kentucky Court of Appeals' injunction against performance (App. 10(a), 13(a), 14(a), pars. 7, 15, 19, *infra*). This defense was sustained despite the allegations of the complaint that Dealers was not free of contributory fault with respect to the injunction because of its fraudulent concealment; because it instigated the employees to bring the action; and because it did not oppose the injunction in the *Moore* litigation. The lower courts accepted Dealers' argument that its only obligation throughout was one of "neutrality" (App. 10(a)-12(a), pars. 8, 10, 16, 17, *infra*), and interpreted this Court's decision in *Humphrey* v. *Moore* "as approving or certainly not condemning the position that Dealers took" (App. 12(a), par. 11, *infra*). The Court further held that the injunction excused the breach because "it was impossible for Dealers Transport to prevent the issuance of the injunction by the Kentucky Court of Appeals." (*Id.* p. 10(a), par. 8). This reasoning warrants review on two counts: (1) it misconceives this Court's prior decision

in this litigation, and (2) it conflicts with the holding of the Second Circuit in *Seedman* v. *Friedman,* 132 F. 2d 290 (C.A. 2).

Taking worst things first, the decision below is a paradoxical inversion of *Humphrey* v. *Moore.* This Court had no occasion there to approve or disapprove the action of Dealers, for the question there was only whether *the Union* was guilty of fraud or breach of *its* duty of fair representation, see 375 U.S. at 351.

The reasoning below also attributes to this Court's decision a plainly untenable proposition—namely, that a party who has agreed to submit the question of contract interpretation to "final and binding determination" (375 U.S. at 351) is entitled to take a "neutral" position on finality when that determination is attacked by a third party.[10] But, what is most serious about this phase of the decision below is that it gives *Humphrey* v. *Moore* only prospective application—the award of the Joint Committee becomes "final and binding" only after the date this Court said it was. We cannot believe that this Court intended to immunize Dealers, whose fault contributed to the state court injunction, from liability to petitioners, whose rights this Court held were infringed thereby.

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[10] Of course, petitioners do not accept the finding that Dealers' position was one of "neutrality." As noted earlier, Dealers in this Court sought, albeit in a sophisticated manner, to upset the award of the Joint Conference Committee. See 375 U.S. at 343, n. 3. Petitioners contend that taking a "neutral" position and failing affirmatively to oppose the injunction were independent breaches of the implied obligation of good faith and fair-dealing, see p. 12, *supra.*

Moreover, the complaint alleges that Dealers supported its employees in bringing the *Moore* action. The findings below, drafted by defendants, are entirely silent with respect to this allegation. The decision, of course, prevents proof of the allegation.

In this respect the decision below conflicts with established contract law as exemplified by the Second Circuit's decision in *Seedman* v. *Friedman,* 132 F. 2d 290 (C.A. 2):

> "The [District] Court, however, stressed the injunction as a supervening act making impossible the performance of the contract. There has been much discussion in this case of the rule that performance of a contract is excused where it is forbidden by a judicial order. We shall not, however, go into that problem further than to say that the rule is not applied where the fault of the party owing performance under the contract contributed to the order. A.L.I. Restatement, Contracts, § 458." *Id.* at 296.

Section 458 of the *Restatement of Contracts* reads:

> "A contractual duty * * * is discharged in the absence of circumstances showing either a contrary intention or *contributing fault* on the part of the person subject to the duty, where performance is subsequently prevented or prohibited * * *
>
> (b) by a judicial * * * order made with due authority by a judge * * * of any of the United States. (Emphasis supplied.)[11]

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[11] Comment 3 to § 458 (p. 854) reads as follows:

> "A contracts with B to sell and to deliver to him a specific automobile on a certain day, time being of the essence. C, by false allegations of ownership of the machine induces a court having jurisdiction to enjoin A from delivering the machine. In spite of diligent effort A is unable to secure dissolution of the injunction until it is too late to fulfill his contract with B. A's duty is discharged. If C had just grounds for obtaining the injunction, or *if A failed in diligent effort to secure its dissolution, A would not be discharged.*" (Emphasis supplied.)

The contributory fault rule is the balance which the law strikes between the interests of the promisor and the promisee where performance is made impossible by an injunction obtained by a third party. While the promisee is denied the fruits of his bargain where both parties are equally innocent, the promisor remains liable for non-performance of his contractual obligation where his fault contributes in any way to the court decree which made performance impossible.

The promisor must answer in damages because damages are the alternative to the prohibited performance, required to compensate the promisee for the loss of his bargain. Judicial prohibition of performance at the instance of a third party does not carry immunity against damages for non-performance where the prohibition is traceable to "defendants' own breach of duty to others." 6 *Corbin on Contracts,* § 1346, p. 430. The contributory fault rule thus prevents promisors from profiting through welcome intervention of third parties, as Dealers here benefited by retaining its own employees throughout the injunction period. It would frustrate the object of the rule and defeat its policy to entertain a plea that the obligor's contributory fault should be excused, as the courts below held, because intervention *might* have occurred anyway.

We fully recognize that principles developed in the common law of contracts are not necessarily carried over into § 301, because attention must also be paid to "the impact of the national labor policy." *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459, 470. But here, national labor policy only reinforces the common law obligation of the promisor. For, as we have noted earlier, performance of contract obligations fulfills an independent statutory objective—promotion of indus-

trial peace. The circumstances in which non-performance is excused should therefore be kept at a minimum.

Since any acts constituting contributory fault constitute independent breaches of the contract, imposition of liability furthers the policies of Section 301 by discouraging contract violations. "The equities in this case seem to favor the employees; it would be inequitable to require them to absorb pay losses ascribable to the [breach of contract] of the Company". Cf. *International U. of E.R. & M. Wkrs.* v. *N.L.R.B.*, 328 F. 2d 723, 727 (C.A. 3). The equities here particularly favor the employees, because Dealers was the moving party in the transaction with E & L and benefited by keeping its own employees. "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley* v. *Livingston*, 376 U.S. 543, 549.

CONCLUSION

The decision below eviscerates Section 301 by rejecting the established law of causation, which is grounded in recognition that immunization from liability on the basis of speculation or conjecture provides incentive to wrongdoing. Certiorari should be granted to concretize the obligation of federal courts under *Lincoln Mills*, to vitalize its promise of reliable contract enforcement, and to remedy the injury suf-

fered by the "victorious" petitioners in *Humphrey* v. *Moore.*

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May 9, 1969

APPENDIX A

Order

[Dated Aug. 10, 1965]

The present question before the Court arising out of this action is whether or not plaintiffs' complaint should be dismissed in accordance with defendants' separate motions submitted on the ground that the complaint fails to state a claim upon which relief can be granted. Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The facts of this case relevant to the pending motions can be briefly stated. Some time prior to the filing of this suit the defendants, Dealers Transport Company, (hereinafter called "Dealers") and E & L Transport Company, (hereinafter called "E & L"), having received notice from the Ford Motor Company that due to a decline in Ford sales in the area there would thereafter be room for the use of only one of these vehicle transport companies in Ford's Louisville operation, devised an arrangement whereby Dealers would sell to E & L and E & L would sell to Dealers such of their respective authority as would allow E & L to concentrate its transportation activities in the more northerly area of the United States and would allow Dealers to concentrate in the more southerly zone.

Due to the withdrawal of E & L from the Louisville area, General Drivers, Warehousemen and Helpers, Local Union No. 89, (hereinafter called the "Union"), the representative of the employees of both E & L and Dealers inquired of E & L as to the nature and cause of its discontinuance of its Louisville operations. As a result of this inquiry, the Union was led to believe that the transaction between the companies involved no trades, sales or exchanges of property, but only a withdrawal by E & L at the direction of the Ford Motor Company. Thus, when E & L employees who began to be laid off started complaining that their

seniority lists should be dovetailed with those of Dealers, the Union's president, Paul Priddy, advised the Dealers employees they had nothing to worry about since, because there was no trade or sale between Dealers and E & L, the E & L employees had no right to the transfer they demanded.

By the time the grievances of the E & L employees reached the Joint Conference Committee, Priddy had become more fully advised of the Dealers-E & L transaction and as a result he recommended to that committee that the seniority lists of the two companies be sandwiched. The Joint Conference Committee accepted this recommendation and subsequently Dealers was instructed to hire E & L employees.

Certain employees of Dealers, being now convinced that their unions had betrayed them, next brought an action in the Kentucky state court praying for an injunction against the Union and Dealers from carrying out the decision of the Joint Conference Committee. The trial court denied an injunction, and though reversed by the Court of Appeals of Kentucky, (Moore v. Local Union 89, International Brotherhood of Teamsters, etc., 356 S.W.2d 241 (1964).), this denial was upheld by the United States Supreme Court. Humphrey v. Moore, 375 U.S. 335 (1963).

Prior to the Supreme Court decision, however, the Union filed suit under Section 301(a) of the National Labor Relations Act, (Title 29 United States Code Annotated, Section 185(a).), asking both for specific performance of the decision of the Joint Conference Committee and for damages in the amount of the wages and salaries lost to E & L employees by reason of Dealers' failure to immediately carry out the Committee's decision. Since the Supreme Court reversed the injunction order of the Kentucky Court of Appeals, Dealers has complied with the Joint Conference Committee's decision to hire certain E & L em-

ployees and consequently the plea for specific performance of that decision is no longer in issue. What remains, then, is the issue of defendants' liability for the loss of E & L employees' wages during the period of the injunction, and it is as to this claim that the defendants have filed their motions for dismissal.

Although E & L's first argument in support of dismissal is that the master contract cannot ground liability to plaintiffs because E & L is not a named party to that contract, it is a well-understood principle of labor law that local parties are bound by a master contract negotiated by their bargaining agent. Fisherty v. McDonald, 178 F.Supp. 544 (D.C. S.D. Cal. 1959). See also Rabouin v. NLRB, 195 F.2d 906, 909-10 (2nd Cir. 1952). Accordingly, by signing the individual contracts defendants merely affirmed the promise of their agent, Automobile Transporters Labor Division, that each would "be bound by all of the terms and provisions of this Agreement and . . by the interpretations and enforcement of the Agreement." Humphrey v. Moore, supra, at p. 339; see also p. 337.

Even if held bound by the collective bargaining agreement, E & L denies having breached its provisions, and it argues that since plaintiffs have pointed to no specific provision which was violated by E & L the complaint should as to it be dismissed. What this argument fails to recognize, however, is that in every contract there is an implied covenant that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 3 Williston (Rev. Ed. 1936) Section 670 as quoted in Local 1912 International Association of Machinists v. U. S. Potash Company, 270 F.2d 496, 498 (10th Cir. 1959). Therefore, if, as is charged, E & L did misrepresent the nature of its transactions with Dealers in order to deprive its employees of their absorption rights under the contract

there would be a sufficient basis for allowing a finding that E & L has violated the "covenant of good faith and fair dealings . . . which must inhere in every collective bargaining agreement if it is to serve its institutional purposes." United Steelworkers v. New Park Mining Company, 273 F.2d 352, 356 (10th Cir. 1959). See also Helene Curtis Industrial Industries, Inc. v. United States, 312 F.2d 774, 778 (Ct.Cl. 1963), and Line Drivers Local 961 v. Digby, Inc., 58 LRRM 2534, 2536 (10th Cir. 1956).

Closely related to E & L's second argument is its contention that since the complaint charges conspiracy and misrepresentation the action is one for tort rather than for breach of contract, and recovery for a tort is not allowed under Section 301(a). The fault of this argument rests in its failure to recognize that while conspiracy and misrepresentation might very well be tortious, this does not prevent it from also constituting a breach of the implied covenant of good faith.

Other problems relating to the proper classification of the wrong charged in the complaint are presented by Dealers. Thus, since the complaint charges that Dealers and E & L conspired together to deprive plaintiffs of their absorption rights, Dealers argues that this action is barred by the Kentucky one year period of limitations applicable to conspiracies. (See KRS 413.130(c).) The fallacy of this argument rests in the fact that " 'a cause of action does not consist of facts . . . but of the unlawful violation of a right which the facts show,' " (Hurn v. Oursler, 289 U.S. 238, 246 (1933). See also UMWA v. Meadow Creek Coal Company, 263 F.2d 52, 59 (1959).), and consequently, since if the acts alleged are true they violate plaintiffs' contractual rights, the proper designation of plaintiffs' claim here is that of breach of contract. For where doubt exists as to the applicable period of limitation the courts lean toward application of the longer period. Hughes v. Reed, 46 F.2d 435 (10th Cir. 1931).

Dealers second argument is that this suit is barred by the Humphrey v. Moore determination that "No fraud is charged against the employer . . ." Humphrey v. Moore, supra, p. 368. The contention is without merit. In the language quoted the Court was speaking only of what was in that case *charged*. Since no fraud was there charged, on no theory could this issue have been a "question of fact essential to the ... . judgment" in that case. See Fiberboard Paper Products v. Machinists, 58 LRRM 2387, 2391 (9th Cir. 1965); Restatement of the Law of Judgments, Section 68, Comment O.

Dealers next argues that although Section 301(a) allows recovery "for violation of contracts between an employer and a labor organization representing employees in an industry," the employees meant to be designated are only those of the breaching employer. More precisely, it is Dealers' contention that "employees" as used in Section 301(a) must be defined as only employees of the offending employer, and since the employee plaintiffs of this case were not employees of Dealers, but were employees of E & L, Dealers argues that Section 301 does not allow the recovery here sought against it. Once again the argument must fail, for as was stated by the Supreme Court in Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 191-92 (1941), the term "employee" as defined and used in the National Labor Relations Act, (See Title 29 U.S.C.A. Section 152(3).), " 'shall include any employee, and shall not be limited to the employees of a particular employer . . .'" See also John Hancock Mutual Life Insurance Company v. National Labor Relations Board, 191 F.2d 483, 485 (D.C. Cir. 1951).

Though it admits that it had a contractual obligation to carry out the decision of the Joint Conference Committee, Dealers argues that it was excused from that obligation by the injunction prohibiting compliance. But it is quite clear that the rule excusing performance of a contract where

it is forbidden by a judicial order is not applied where the fault of the party owing performance contributed to the order, (See Restatement of the Law of Contracts, Section 458.), particularly where the contributory fault is fraud, (See Seedman v. Friedman, 132 F.2d 290, 296 (2nd Cir. 1942).), and thus since the facts alleged in this case would constitute such contributory fault, Dealers cannot be allowed dismissal on the basis of the injunction alone.

The final argument which Dealers makes on behalf of its motion for dismissal is that because plaintiffs have failed to allege that they have carried out the provisions of Article 9 of the collective bargaining agreement requiring that "An appeal from discharge, suspension or warning notice must be taken within ten (10) days by written notice, and a decision reached within thirty (30) days from the date of discharge, suspension or warning notice," the complaint is fatally defective. Although plaintiffs make no attempt to answer this contention, it is obviously fruitless, since even if it be assumed that Article 9 does require, as a condition precedent to the bringing of a court action, some appeal from a "discharge, suspension or warning notice," the present suit complaint of neither a discharge, suspension nor warning notice, but rather of the failure of Dealers to hire them in the first place. For this reason, Dealers' fifth argument in support of dismissal must be rejected, and since all the other reasons argued by defendants in support of their motions were similarly rejected, those motions are denied.

IT IS SO ORDERED.

/s/ HENRY L. BROOKS
United States District Judge

August 10, 1965

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 4709

WALTER HUMPHREY, ET AL., *Plaintiffs*

v.

DEALERS TRANSPORT, ET AL., *Defendants*

Order

A pretrial conference was held in this case on August 30, 1967, and the order provided that the defendants, Dealers Transport, et al., submit findings of fact and conclusions of law and tender judgment in conformance with the oral opinion rendered by the Court.

The tendered findings of fact and conclusions of law and the objections thereto have been considered, and

IT IS NOW ORDERED AND ADJUDGED that the tendered findings of fact and conclusions of law are adpoted as the facts and the law of this action and plaintiffs' complaint is dismissed.

/s/ HENRY L. BROOKS
Henry L. Brooks
United States District Judge

October 19, 1967

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 4709

Findings of Fact and Conclusions of Law

1. The defendants, Dealers Transport Company and E and L Transport Company, were each in the business of transporting new Ford automobiles from the assembly plant in Louisville, Kentucky. In the face of declining business resulting from several factors, the two companies were informed by Ford that there was room for only one of them in the Louisville operation. After considering the matter for several months the two companies made an arrangement whereby E and L would sell to Dealers its secondary authority out of Louisville, the purchase price to be a nominal sum approximately equal to the cost of effecting the transfer of authority; E and L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana. Dealers would sell to E and L its initial authority out of Lorraine, Ohio. These transfers were subject to the approval of the Interstate Commerce Commission and the proceedings were of public record.

2. The employees of both E and L and Dealers were represented by Teamsters Local Union # 89. Paul Priddy, President of Local # 89, as the result of inquiry from E and L by his assistant, understood that the transaction between the companies involved no trades, sales or exchanges of property but only a withdrawal by E and L at the direction of the Ford Motor Company.

3. It is the position of the plaintiff that the information furnished to the Union by E and L and Dealers was intentionally erroneous. It is further their position that said erroneous information constituted fraud by the defendants. It is clear from the record, however, in Hum-

phrey v. Moore, 375 U.S. 335 (1964), that all of the facts were subsequently known and were timely presented to the Joint Grievance Committee at Detroit. Clearly, the decision of the Joint Committee was in no way influenced or made erroneous by the alleged antecedent fraud of the defendants. As pointed out by the Supreme Court in Humphrey v. Moore, supra, the Dealers employees were represented at the hearing and they did not request a continuance in order to be better represented after they found out that Priddy was going to recommend that the Seniority Boards of the two companies be dovetailed.

4. As also stated in that decision, the Dealers employees in no way suggested what they could have added to the hearing by way of facts or theory if they had been differently represented. The Supreme Court agreed with the opinion of Judge Smith in the Jefferson Circuit Court that it would be "idle speculation to assume that the result would have been different had the matter been differently presented." Humphrey v. Moore, supra.

5. The decision of the Committee was within its power, as so stated by the Supreme Court, and its decision was both fair and equitable.

6. The defendant, Dealers, maintained a neutral position throughout the entire Joint Grievance Committee hearing. After the Joint Committee's decision, Dealers Transport started to implement said decision by laying off some of its employees and by hiring E and L employees. (Snipes deposition p. 90). At this time a group of Dealers employees filed suit in the Jefferson Circuit Court seeking to enjoin implementation of the Joint Committee decision. The Circuit Court upheld said decision but on appeal the Court of Appeals of Kentucky issued an injunction. When the injunction was issued Dealers ceased sandwiching the two Seniority Boards, discharged the E and L employees and rehired its own previous employees.

7. Plaintiffs argue that the alleged antecedent fraud of Dealers and E and L permiated all actions that occurred thereafter. They argue that this fraud caused and brought about the law suit that was filed by the Dealers employees and as a result the ultimate injunction that was issued by the Kentucky Court of Appeals. Plaintiffs argue that Dealers was forced to obey the decision of the Joint Committee. This latter point is true, however, the injunction was legally binding on Dealers Transport and they had no choice but to cease sandwiching the two employee Boards.

8. Plaintiffs argue that the defendants cannot use the injunction as a defense because they were bound to prevent the injunction from being issued and they were further bound to take all possible steps to void said injunction once it had been issued. Plaintiffs cite a great deal of authority to support this position; however, said authority is totally distinguishable upon the facts. Plaintiffs' cases for the most part deal with a situation where there is a contractual agreement between two parties and one of the parties either through its own action or by inaction allows an injunction to be issued against it, thereby preventing said party from fulfilling its contractual obligations. In the instant case the facts are totally different. As pointed out by every court that considered the case of Humphrey v. Moore, the employer, Dealers Transport, considered the controversy to be a dispute within the Union. Dealers Transport remained neutral. Even though Dealers Transport was bound to enforce the Joint Committee decision it could not and did not have any power to prevent the law suits that were in fact filed. In fact, for Dealers to have taken a position of advocacy, either for or against either one of the employee groups, would have no doubt constituted an unfair labor practice. Title 29 United States Code Section 158. Dealers Transport was helpless to prevent the injunction that was issued. The Defendant, E and

L Transport Company, was not even a party to the injunction proceedings and the litigation in Humphrey v. Moore and obviously cannot be charged with any negligence or liability for action or inaction in that litigation. Plaintiffs' contention that there would not have been an injunction nor any law suit had it not been for the antecedent fraud of the defendants is a very speculative and tenuous theory that pyramids inference upon inference. If the Joint Committee decision was fair, as the Supreme Court has held, then surely all that took place afterwards cannot be blamed upon the alleged antecedent fraud.

9. To assume that there would not have been a law suit challenging the Joint Committee's decision had the defendants not engaged in the alleged misrepresentation is to be very naive. The statements by Priddy to the E and L employees that their jobs were tenuous, caused them to file a grievance. The Court cannot now say that if the opposite information had been given to the respective employees that there would not have been a grievance filed by the Dealers employees. In fact the history of this case quite clearly shows that there would have been a grievance filed. Instead of filing a grievance the Dealers employees presented their case before the Joint Committee. In addition those unsuccessful Dealers employees filed a suit to challenge the Committee's decision. It is quite fair to assume that had the Dealers group been successful before the Joint Committee that the E and L employees would have filed a similar suit.

10. Plaintiffs argue that Dealers should have been more of an advocate in its attempt to prevent the injunction and to set aside said injunction. It is true that Dealers maintained its neutraility (sic) in all Courts, however, the respective employees of both companies were adequately represented at all stages of the proceedings. It would hav been quite futile for Dealers to have been more of an advocate, and this Court is certainly not prepared to say

that the result would have been any different regardless of the position Dealers might have taken.

11. This Court interprets Humphrey v. Moore as approving, or certainly not condemning, the position that Dealers took. In addition, the very recent Kentucky case of Ball v. Eastern Coal Corporation, Ky., 415 S.W. 2d 620 (March, 1967), was a case with very, very similar facts to Humphrey v. Moore. Judge Palmore followed Humphrey v. Moore and in that case approved of the relatively neutral position taken by the employer.

12. Dealers Transport Company argues in this Court that the issue of fraud was settled in the case of Humphrey v. Moore. It is true, as stated in the Supreme Court decision, that there were no allegations of fraud against Dealers. Plaintiffs argue that this is not dispositive of the issue, however, since it was not necessary to raise that issue in that case. This position is not persuasive. The reading of Humphrey v. Moore, as well as the reading of the record in this case, coupled with the statements of plaintiffs' counsel as to what plaintiffs plan to prove in this case, if same should be tried, indicates that the alleged fraud committed by Dealers and E and L is without merit. It should be noted that the plaintiffs, Dealers Transport, Local #89 and the Dealers employees were all parties to Humphrey v. Moore. It is hard to believe that if any party in the former law suit had considered Dealers guilty of any misrepresentation that they would not have raised said issue in the first law suit. To raise same now seems to be an afterthought.

CONCLUSIONS OF LAW

13. It is the finding of this Court that even if the defendants, Dealers Transport and E and L Transport, were guilty of fraud as alleged by the plaintiffs, said misrepresentations were adequately discovered by the plaintiffs

and/or their representatives in advance of the Joint Grievance Committee hearing in Detroit. As a result, the plaintiffs were in no way misled by said fraud, they did not rely to their detriment on said statements, and any possible adverse effects said fraud could have had were cured by the full hearing that was held at Detroit and whose decision was found by the Supreme Court to be fair and equitable. Morgan v. Graham, 228 F.2d 625 (10th Cir. 1956); Wilson v. Henry, Ky., 340 S.W. 2d 449 (1960); O'Brien v. Marvin, Ky., 387 S.W. 2d 282 (1965); Snyder v. Rhinehart, 274 Ky. 274, 118 S.W. 2d 543 (1938); McGuffin v. Smith, 215 Ky. 606, 286 S.W. 884 (1926); 23 Am. Jur., Fraud and Deceit, sec. 141 et seq.

14. The alleged antecedent fraud of the defendants was not responsible for the law suit that was filed by Dealers employees. It would be stretching the imagination to rule as a matter of law that but for said alleged fraud no law suits would have been filed.

15. In addition, it is the opinion of the Court that it was impossible for Dealers Transport to prevent the issuance of the injunction by the Kentucky Court of Appeals. As a result they had no choice but to obey said injunction and to cease implementing the decision of the Joint Grievance Committee. Chicago, B & Q R.R. Co. v. Fowler, 27 S.W. 2d 72 (1930).

16. Likewise, the neutral position taken by Dealers throughout the controversy was fair and necessary. Title 29 United States Code 158; Ball v. Eastern Coal Corporation, Ky., 415 S.W. 2d 620 (1967).

17. All parties to Humphrey v. Moore were more than adequately represented, especially these plaintiffs who were successful in said litigation. It would have been futile for Dealers to have taken a more active role in said law suit. It is idle speculation for the plaintiffs to argue that

Dealers could have in any way changed the course of events that occurred in that law suit.

18. Inasmuch as defendant, E and L Transport Company, was not a party to the litigation, it could not be charged with any responsibility or liability for any alleged damages resulting from the injunction.

19. Even if plaintiffs' theories of fraud and misrepresentation were deemed actionable, this Court finds that as a matter of law no damages will lie for the period of delays during which the injunction of the Court of Appeals was in effect.

20. If Dealers has improperly sandwiched any former E and L employees into its operation, then said employees have a remedy under the Grievance procedure of their contract in Article 4, Section 1.

Judgment in accordance with these findings of fact and conclusions of law is this day ordered.
October 19, 1967

/s/ HENRY L. BROOKS
Henry L. Brooks
United States District Judge

APPENDIX C

[Filed January 10, 1969]

NO. 18,502
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WALTER HUMPHREY, DONALD V. MALONE, ROBERT KALWAT, and MARION A. SACKSTEDER, *Plaintiffs-Appelants,*

v.

DEALERS TRANSPORT COMPANY, and E & L TRANSPORT COMPANY, *Defendants-Appellees.*

Order

BEFORE: O'SULLIVAN and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

The above cause coming on to be heard upon the briefs and record, and the arguments of the parties in open court, and the Court being duly advised,

Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that the judgment be and is hereby affirmed for the reasons set forth in the Findings of Fact and Conclusions of Law of Judge Henry L. Brooks.

ENTERED BY ORDER OF THE COURT

CARL W. REUSS
Clerk

SUPREME COURT, U. S.

JUN. 9 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1379

WALTER HUMPHREY,
DONALD V. MALONE,
ROBERT KAIWAT and
MARION A. SACKSTEDER, - - - Petitioners,

versus

DEALERS TRANSPORT COMPANY and
E & L TRANSPORT COMPANY, - - Respondents.

Response of Dealers Transport Company to the Petition for a Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1379

WALTER HUMPHREY,
DONALD V. MALONE,
ROBERT KAIWAT and
MARION A. SACKSTEDER, - - - *Petitioners,*

v.

DEALERS TRANSPORT COMPANY and
E & L TRANSPORT COMPANY, - - *Respondents.*

Response of Dealers Transport Company to the Petition for a Writ of Certiorari.

QUESTIONS PRESENTED.

Respondent accepts the Questions Presented as stated by Petitioners; however, they deny that there was any breach of contract as alleged in Question I. In addition, Respondent denies that it failed to perform any obligation required by *Humphrey* v. *Moore,* 375 U. S. 335 or that it was guilty of any "contributory fault" as alleged in Question II. The opinion of the District Court supports Respondent's position.

STATEMENT OF THE CASE.

The facts of the present case are accurately stated in *Humphrey* v. *Moore,* 375 U. S. 335, and in the District Court's Findings of Facts and Conclusions of Law (App., pp. 32a-38a).[1] In addition, the synopsis of facts contained in the Petitioner's Brief is an accurate statement of the Petitioner's position in the present case.

Several additional facts should be brought to this Court's attention. The Petitioners are the former employees of E & L Transport Company and they are now employees of Dealer's Transport Company. They became employees of Dealers pursuant to the Supreme Court decision in *Humphrey* v. *Moore, supra.*

Dealers Transport Company in its answer to the Petitioners original complaint, pled three affirmative defenses. First that the permanent injunction issued by the Court of Appeals of Kentucky made it impossible for Dealers to carry out the decision of the Joint Grievance Committee; namely, to dovetail the seniority lists of E & L Transport Company and Dealers Transport Company. Said dovetailing process was being carried out at the time that Dealers was enjoined.

Secondly, Dealers pled that it was neutral throughout the *Humphrey* v. *Moore* litigation. They were neutral before the issuance of the injunction and afterwards.

Finally, Dealers pled that it was under no duty to act other than as a neutral party during the *Humphrey*

[1]The Respondent will use the Court of Appeals citation to the appendix, as did the Petitioner, and it will be cited throughout this brief as "App.," unless otherwise designated.

v. *Moore* litigation; but that even if it were under a duty to have acted in a manner other than it did, said acts would have been futile because Petitioners were adequately represented at all stages of the *Humphrey* v. *Moore* litigation (App., pp. 24a-26a).

It has been the position of Dealers from the outset that the Supreme Court decision in *Humphrey* v. *Moore* was dispositive of this present action. Dealers took the position that *Humphrey* v. *Moore* supported each of its aforesaid affirmative defenses and the District Court so held in its Findings of Fact and Conclusions of Law.

ARGUMENT.

I.

Whether It Is Compatible With Section 301 of the Labor Management Relations Act, 1947, to Deny Recovery to Victims of a Breach of Contract on the Theory That They Are Required to Estabilsh That the Injury Would Not Have Occurred But for the Breach?

It has been the Petitioners' position from the outset that the alleged antecedent fraud of the Respondents was responsible for all events that occurred thereafter. Petitioners have not changed their theory, however, in an attempt to create an issue to be reviewed by this Court they have shifted their emphasis. The Petitioners are apparently arguing that the alleged conduct of the Respondents was an unfair labor practice and that such conduct automatically amounts to a breach of contract and is subject to Section 301(a) jurisdiction. Furthermore, Petitioners argue that they do not have to prove that this conduct was in any way responsible

for the ensuing events. Rather they argue that the Respondents must prove the negative, namely, that the antecedent conduct was in no way responsible for the ensuing *Humphrey* v. *Moore* litigation.

Petitioners rest their argument on one sentence of the District Court's opinion which is as follows: "It would be stretching the imagination to rule as a matter of law that but for said alleged fraud no law suits would have been filed" (Petitioners' App. B, p. 13a).

Petitioners completely overlook the full meaning of the District Court's opinion. The basis of that opinion was that even if the Respondents were initially guilty of fraud, that prior to the hearing before the Joint Grievance Committee, all of the relevant and important facts necessary for determining the issues were known by all of the parties involved and were presented to the Committee. This interpretation was based upon the decision of *Humphrey* v. *Moore*.

Petitioners argue that the failure of the Respondents to disclose amounted to a breach of contract "by the express provisions of § 8(a)(5) and 8(d) of the Act which 'are part of the federal law of labor agreements' " (Petitioners' Brief, p. 12). Petitioners take this approach in an attempt to avoid having to prove that the Respondents' initial alleged conduct was in any way responsible for the ultimate issuance of an injunction. Of course, it is elementary that neither this court, nor any court, has held that an unfair labor practice automatically constitutes a breach of contract. Such a theory would completely destroy the pre-emptive jurisdiction of the National Labor Relations

Board. Obviously some unfair labor practices can also be a breach of contract; however, in those cases where 301 jurisdiction has been found there has been alleged a specific breach of the particular contract. The absurdity of adopting a rule that would make all unfair labor practices subject to a 301 suit is obvious from the facts of the present case.

Petitioners attempt to sustain their theory that the burden of proof should be upon the Respondents instead of the Petitioners by citing *NLRB* v. *C.&C. Plywood Corp.*, 385 U. S. 421 (Petitioners' Brief, p. 2). This case did not involve fraud. It was a refusal to negotiate a premium pay plan which was instituted by the employer without consulting the union in violation of the collective bargaining agreement which was in effect.

The union filed an unfair labor practice and the company claimed that the National Labor Relations Board was without jurisdiction on this issue because a breach of contract was involved. This court found that a breach of contract could be an unfair labor practice in some instances. Petitioners now ask for the converse even though no unfair labor practice has been proven or for that matter charged. The *C.&C. Plywood* case held that the National Labor Relations Board did not have general "power to determine the rights of parties under all collective bargaining agreements . . ." (p. 427). Accordingly an unfair labor practice does not in any way establish a breach of contract. Perhaps both will exist under a certain set of facts, but a breach

of contract action can only be established by competent proof in that particular action.

The true basis of the Petitioners' complaint is an action based upon fraud. There is no reason why the Petitioners should not have to prove that there were false representations made by the Respondents and that they relied upon them to their detriment. The Petitioners should not be allowed to maintain a breach of contract action on the theory of fraudulent misrepresenation unless they can sustain the typical elements of fraud.

The opinion of the District Court recognizes that the Petitioners did not rely upon the alleged misrepresentations and that when the Joint Grievance Committee reached its decision it had heard all of the relevant facts.

The true basis of the District Court's Opinion can be seen in the first paragraph of its Conclusions of Law:

> "It is the finding of this Court that even if the defendants, Dealers Transport Company and E & L Transport, were guilty of fraud as alleged by the plaintiffs, said misrepresentations were adequately discovered by the plaintiffs and/or their representatives in advance of the Joint Grievance Committee hearing in Detroit. As a result, the plaintiffs were in no way misled by said fraud, they did not rely to their detriment on such statements, and any possible adverse effects said fraud could have had were cured by the full hearing that was held at Detroit and whose decision was found by the Supreme Court to be fair and equitable" (Petitioners' App. B, pp. 12a-13a).

It must be remembered, and Petitioners do not argue to the contrary, that the alleged misrepresentations were in no way relied upon by the Petitioners. Proof of this is the fact that the E & L employees, these Petitioners, filed a grievance immediately upon being informed that E & L Transport Company was withdrawing from Louisville (E & L App., 6th Circuit, p. 1b). Obviously the Petitioners in no way relied upon any alleged misrepresentations by the management of E & L or Dealers Transport. From the date of the initial grivance the E & L employees took a position contrary to the alleged misrepresentations and contended, successfully, that there was an absorption between the two companies.

Petitioners can not sustain their position unless it can be held as a matter of law that the Respondents' alleged initial misconduct constituted a *per se* breach of contract. If subsequent disclosure of all facts, and nonreliance upon the alleged misconduct, is a valid defense then the Petitioners have no standing in court. The District Court so held and the fundamental reasoning contained in its opinion should be sustained by this court.

II.

Whether Non-Performance of Obligations affirmed in *Humphrey* v. *Moore*, 375 U. S. 335, Is Excused by the State Court Injunction, Therein Reversed, Although the Employer-Obligor Was Not Free of Contributory Fault?

The Petitioner in its brief (p. 18) accurately states the position of the District Court relative to the above issue. Petitioners then argue, however, that such a position warrants review by this Court on two counts, both of which are enumerated in their brief. The first question involves an attack upon the position that Dealers took following the Joint Grievance Committee's decision. Petitioners have alleged throughout that the Respondents' initial contributory fault formed a basis for the issuance of the injunction, but the District Court did not so hold. At best the District Court held that even if there were initial misconduct that it was cured by the full disclosure and hearing before the Joint Grievance Committee.

Keeping the above in mind, it is Respondents' very strong position that the action of Dealers Transport was proper and necessary.

First of all, Dealers Transport was in the process of sandwiching the two seniority boards, and had as a practical matter accomplished same, when the injunction was issued by the Kentucky Court of Appeals.

Petitioners take the position that *Humphrey* v. *Moore* in no way approves of the position taken by Dealers because the only issue in that case was the fraud or unfair representation of the union. Respond-

ents and the District Court believe that such an interpretation is overly restricted. The Kentucky Court of Appeals and the Supreme Court recognized that Dealers was itself essentially neutral. As stated in *Humphrey* v. *Moore,* "No fraud is charged against the employer; . . . The fair inference from the complaint is that the employer considered the dispute a matter for the Union to decide." 375 U. S. 335, 343.

Petitioners next contend that the decision of the Second Circuit in *Seedman* v. *Friedman,* 132 F. 2d 290, is in conflict with the lower court's opinion. In that case a debtor and a creditor's committee entered into an agreement under the Bankruptcy Act. The confirmation of the agreement was procured by fraud on behalf of the debtor and the committee. After receiving confirmation, the committee found that it could realize a greater profit, and the referee in bankruptcy "permanently restrained and enjoined" the proposed sale to the claimant. The Court held that the fraud of the debtor and the committee prevented them from taking advantage of the injunction that prevented the sale to the claimant. The claimant was allowed to recover for breach of this contract.

The *Seedman* case stands for the proposition that the rule which excuses performance because of an injunction "is not applied where the fault of the party owing performance under the contract contributes to the order" (p. 296).

Respondent has no argument with such a rule. It would be absurd, however, to extend that rule to the facts of the present case. Unlike the debtor and his

committee, Dealers did not enter into a contract, which was founded upon fraud, with a third party. Dealers was ordered to perform by the Committee and then enjoined from performance by the Court of Appeals. Dealers was not responsible for either decision. This factual distinction is the key difference between the present case and the line of authority expounded in *Seedman*. Dealers is entitled to apply the general rule of law that an injunction does excuse performance.

The law is well settled that an act of law, including a court order, rendering performance of a contract impossible, is a defense to an action for damages for non-performance. *Fritz-Rumer-Cooke Co.*, 279 F. 2d 200 (C.A. 6th, 1960).

There is an overriding similarity in all of the cases and Hornbook citations which hold that "impossibility" is not a defense. The one main ingredient is that the promissor himself took some step to render his performance impossible. Dealers Transport did everything that every tribunal told it to do. It obeyed the decision of the Joint Grievance Committee. It stopped doing that when the Court of Appeals said for it to stop. It then implemented that decision when the Supreme Court so ruled.

Petitioners were successful in *Humphrey* v. *Moore*, and now they want to enrich themselves at the expense of their present employer, who was unwillingly trapped between two employee groups. The District Court recognized the absurd inequity in the Petitioners' law suit, and followed sound legal principles in dismissing same.

There are several allied arguments relative to this particular issue. It must be remembered that Dealers Transport was a party to the *Humphrey* v. *Moore* litigation, but at no time were any of the allegations of this suit raised in that earlier action. Since we are re-litigating the same facts that existed in *Humphrey* v. *Moore* it is the Respondent's position that that case is *res judicata* to the present law suit. In addition, the Petitioners, when they were discharged by Dealers pursuant to the injunction of the Kentucky Court of Appeals, should have filed a grievance under the collective bargaining agreement if they believed that their contractual rights had been violated. They did not do so and for this reason they are precluded from bringing a 301 action because they did not exhaust their contractual remedies. *Republic Steel Corporation* v. *Maddox,* 379 U. S. 650 (1964).

Finally, it is Dealers position that they were justified in being neutral and that it would have been futile for them to have taken a more active role in the *Humphrey* v. *Moore* litigation. This Court must realize that the two employee groups who were locked in combat in *Humphrey* v. *Moore* were represented by outstanding legal counsel. In fact the Petitioners were so well represented that they were successful before this Court. It is impossible to see how a more aggressive role by Dealers could have resulted in any greater benefit to these Petitioners. Petitioners argue that Dealers is not entitled to use the injunction as a defense because it did not seek to dissolve the injunction. The Petitioners, however, were parties to the injunction proceed-

ings, and they diligently, without success initially, defended against the issuance and continuance of the injunction, demonstrating the futility of the Respondent for duplicating those efforts. Petitioners can not profit from their own inability to secure immediate dissolution by charging that Dealers did not duplicate their futile efforts.

An excellent discussion of this rule is found in the case of *Chicago, B & O R. Co.* v. *Fowler,* 224 M.A. 736, 27 S. W. 2d 72 (1930). In that case the Court stated *inter alia:*

> "If the real party in interest could not succeed in obtaining a further or different order of court at the time, what measure of success could the bailee or railroad company hope to have in a like undertaking?"

It is clear that Dealers Transport Company was not derelict in its duties to either employee group by taking a neutral position. Both groups were adequately represented and anymore active participation by Dealers would have been futile.

CONCLUSION.

The facts of the present case are not in dispute for they were determined as such in *Humphrey* v. *Moore.* They show that the Petitioners neither relied upon nor suffered any damage as a result of the alleged misrepresentation. Realizing this, the Petitioners should not be allowed to establish a breach of contract based upon the alleged antecedent misconduct of the Respondents.

Petitioners should be forced as are all other litigants to show that they were damaged by having relied upon said alleged conduct. This, of course, they can not do and the lower court has so held.

The issues of this case were disposed of in *Humphrey* v. *Moore* and that case is a bar to this suit. The Petitioners have not alleged any breach of contract nor the exhaustion of the grievance procedure set out in the contract, both of which are fatal to an action under 301 of the Labor Management Relations Act.

Respondents' neutrality and its obeyance of the injunction was proper and necessary conduct, and can not form a basis for Petitioners' cause of action.

The petition should be denied therefore affirming the decision of the District and Appellate Courts.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1379

WALTER HUMPHREY,
DONALD V. MALONE,
ROBERT KALWAT and
MARION A. SACKSTEDER, - - - - Petitioners,

versus

DEALERS TRANSPORT COMPANY and
E & L TRANSPORT COMPANY, - - Respondents.

BRIEF FOR RESPONDENT, E & L TRANSPORT COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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June 10, 1969.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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OPINIONS BELOW.

The opinion of the District Court for the Western District of Kentucky dismissing the Complaint is not reported, but is reprinted as App. B, pp. 7a-14a, of the Petitioners' Brief. The Court of Appeals for the Sixth Circuit affirmed the District Court for the reasons set forth in the District Court's findings of fact and conclusion of law. The order of the Sixth Circuit Court of Appeals is unreported and is printed in the Petitioners' Brief as App. C, p. 15a.

JURISDICTION.

The Petitioners have invoked the authority of this Court to review cases in the Courts of Appeal under 28 U.S.C. § 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

The petition lists two questions for review (Pet. 2). Stated summarily they are:

1. Is an employee in a Section 301 action required to show that his injury resulted from the breach?

2. Is non-performance of contractual obligations excused when performance is enjoined by a Court Order?

STATUTES INVOLVED.

§ 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 reads in pertinent part as follows:

> Section 301(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (61 Stat. 156; 29 U.S.C. § 185)

COUNTER-STATEMENT OF THE CASE.

Petitioners' statement of the facts omits or slants the facts relevant to this litigation, thus requiring this counter-statement of the case. The petitioner Humphrey and the class of petitioners here were the defendants in the litigation that reached this Court and culminated in the decision in *Humphrey* v. *Moore,* 375 U. S. 335 (1964). In that litigation these petitioners were the successful parties. Following upon that litigation they brought the instant litigation. This Court fully summarized the facts in its Opinion in *Humphrey* v. *Moore, supra,* and since these petitioners are bound by that determination, we set them out here:

> "Part of the business of each of these companies was the transportation of new automobiles from the assembly plant of the Ford Motor Company in Louisville, Kentucky. In the face of declining business resulting from several factors, the two companies were informed by Ford that there was room for only one of them in the Louisville operation. After considering the matter for some time, the two companies made these arrangements: E & L would sell to Dealers its 'secondary' authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities. The purpose of these arrangements was to concentrate the transportation activities of E & L in the more northerly area and

those of Dealers in the southern zone. The transfers were subject to the approval of regulatory agencies.

"The employees of both Dealers and E & L were represented by the same union, General Drivers, Warehousemen and Helpers, Local Union No. 89. Its president, Paul Priddy, as the result of inquiry from E & L by his assistant, understood that the transaction between the companies involved no trades, sales, or exchanges of properties but only a withdrawal by E & L at the direction of the Ford Motor Company. He consequently advised the E & L employees that their situation was precarious. When layoffs at E & L began three E & L employees filed grievances claiming that the seniority lists of Dealers and E & L should be 'sandwiched' and the E & L employees be taken on at Dealers with the seniority they had enjoyed at E & L. The grievances were placed before the local joint committee, Priddy or his assistant meanwhile advised Dealers employees that they had 'nothing to worry about' since E & L employees had no contract right to transfer under these circumstances.

"The collective bargaining contract involved covered a multi-employer, multi-local union unit negotiated on behalf of the employers by Automobile Transporters Labor Division and on behalf of the unions by National Truckaway and Driveaway Conference. Almost identical contracts were executed by each company in the unit and by the appropriate local union. According to Art. 4, § 1 of the contract 'seniority rights for employees shall prevail' and 'any controversy over the employees' standing on such lists shall be submitted

to the joint grievance procedure. . . .' Section 5 of the same article, of central significance here, was as follows:

"'In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure.'

"Article 7 called for grievances to be first taken up between the employer and the local union and, if not settled, to be submitted to the local joint committee where the union and the employer were to have equal votes. Failing settlement by majority vote of the members of the local committee, the matter could be taken to the Automobile Transporters Joint Conference Committee upon which the employers and the unions in the overall bargaining unit had an equal number of representatives. Decisions of the Joint Conference Committee were to be 'final and conclusive and binding upon the employer and the union, and the employees involved.' However, if the Joint Conference Committee was unable to reach a decision the matter was to be submitted to arbitration as provided in the contract.

"Article 7 also provided that:

"(d) 'It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Confer-

ence Committee, which Committee, after listening to testimony on both sides, shall make a decision.'

"Other provisions of the contract stated that it was 'the intention of the parties to resolve all questions of interpretation by mutual agreement' and that the employer agreed 'to be bound by all of the terms and provisions of this Agreement, and also agrees to be bound by the interpretations and enforcement of the Agreement.'

"The grievances of the E & L employees were submitted directly to the local joint committee and endorsed 'Deadlocked to Detroit for interpretation' over the signatures of the local union president and the Dealers representative on the committee. Later, however, the local union, having been more fully advised as to the nature of the transaction between the two companies, decided to recommend to the Joint Conference Committee that the seniority lists of the two companies be dovetailed and the E & L employees be employed at Dealers with seniority rights based upon those which they had enjoyed at E & L. The three shop stewards who represented the Dealers employees before the Joint Conference Committee meeting in Detroit were so advised by the union immediately prior to the opening of the hearing. After hearing from the company, the union and the stewards representing Dealers employees, the Joint Conference Committee thereupon determined that 'in accordance with Article 4 and particularly subsections 4 and 5' of the agreement the employees of E & L and of Dealers should 'be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein. . . .'

"Since E & L was an older company and most of its employees had more seniority than the Dealers employees, the decision entailed the layoff of a large number of Dealers employees to provide openings for the E & L drivers.

"Respondent, Moore, on behalf of himself and other Dealers employees, then brought this class action in a Kentucky state court praying for an injunction against the union and the company to prevent the decision of the Joint Conference Committee from being carried out. Damages were asked in an alternative count and certain E & L employees were added as defendants by amendment to the complaint. The complaint alleged that Dealers employees had relied upon the union to represent them, that the president of Local 89, Paul Priddy, assured Dealers employees that they had nothing to worry about and that precedent in the industry provided that when a new business is taken over, its employees do not displace the original employees of the acquiring company; it further alleged that Priddy had deliberately 'deadlocked' the local joint committee and that the Dealers employees learned for the first time before the Joint Conference Committee in Detroit, that Priddy favored dovetailing the seniority lists. Priddy's actions, the complaint went on, 'in deceiving these plaintiffs as to his position left them without representation before the Joint Conference Committee.' The decision, according to the complaint, was 'contrived, planned and brought about by Paul Priddy' who 'has deceived and failed completely to represent said employees' and whose 'false and deceitful action' and 'connivance . . . with the employees of E & L' threatened the

jobs of Dealers employees. The International union is said to have 'conspired with and assisted the defendant, Local No. 89, and its president, Paul Priddy, in bringing about this result. . . .' The decision of the Joint Conference Committee was charged to be arbitrary and capricious, contrary to the existing practice in the industry and violative of the collective bargaining contract.

"After hearing, the trial court denied a temporary and permanent injunction. The Court of Appeals of the Commonwealth of Kentucky reversed and granted a permanent injunction, two judges dissenting. 356 S. W. 2d 241. In the view of that court, Art. 4, § 5 could have no application to the circumstances of this case since it came into play only if the absorbing company agreed to hire the employees of the absorbed company. The clause was said to deal with seniority, not with initial employment. Therefore, it was said, the decision of the Joint Conference Committee was not binding because the question of employing E & L drivers was not 'arbitrable' at all under this section. The Court of Appeals, however, went on to hold that even if it were otherwise, this decision could not stand since the situation involved antagonistic interests of two sets of employees represented by the same union advocate. The result was inadequate representation of the Dealers employees in a context where Dealers itself was essentially neutral. Against such a backdrop, the erroneous decision of the board became 'arbitrary and violative of natural justice.' Kentucky cases were cited and relied upon." (375 U. S. 335 at 336.)

This Court went on to find that there had been an absorption of E & L Transport Company (hereinafter "E & L") by Dealers Transport Company (hereinafter "Dealers"), and ordered the reinstatement of the Automobile Transporters Joint Conference Opinion (hereinafter "Joint Committee"). The court noted that "no fraud is charged against the employer. . . ." (375 U. S. 335 at 343).

Following upon this Court's determination, as set out above, the petitioners brought the instant litigation seeking to recover damages from the respondents. The damages sought were the wages allegedly lost by the petitioners during the period that the Kentucky Court of Appeals' injunction, later reversed by this Court, prevented the respondent Dealers from putting into effect the prior Award of the Joint Conference Committee. The suit, by the same petitioners who were successful in convincing this Court that there was no fraud involved in the Joint Conference Committee hearing, now alleged that Dealers and E & L had misrepresented to their employees the terms of the withdrawal of E & L from Louisville. The specific misrepresentation was alleged to be the fact that there was an absorption rather than some other arrangement. Some three years after the suit was filed, during which all of the parties were given the fullest opportunity to engage in pre-trial discovery and the taking of depositions, the District Court dismissed the complaint holding:

(1) That the Petitioners discovered the alleged fraud in advance of the Joint Committee's hearing in

Detroit and, therefore, were in substance no way misled; and

(2) That the Petitioners in no way relied to their detriment on the statements; and

(3) That any possible adverse effects of the alleged fraud were cured by the full hearing before the Joint Committee in Detroit, whose decision was found to be fair and equitable by the Supreme Court of the United States; and

(4) That it was stretching the imagination that the alleged antecedent fraud of the Respondents caused the litigation, styled *Humphrey* v. *Moore, supra,* resulting in a delay of the implementation of the Joint Committee's findings; and

(5) That E & L was not a party to *Humphrey* v. *Moore, supra* and, therefore, could not be charged with any responsibility or liability for alleged damages resulting from the Kentucky Court of Appeals injunction which was later overturned by the United States Supreme Court; and

(6) That even if the Petitioners' theories of fraud and misrepresentation were deemed actionable, as a matter of law no damages lay for the period of delay during which the injunction of the Court of Appeals was in effect.

From this opinion the Petitioners prosecuted their Appeal to the Sixth Circuit Court of Appeals which summarily affirmed the lower court's opinion. From this decision the Petitioners have petitioned this Court for the granting of a Writ of Certiorari.

ARGUMENT.

I.

The Courts Below Applied Well Established Principles of Contract and Fraud Law to the Facts and the Decisions in No Way Debilitate the Provisions of Section 301.

The Petitioners argue at some length in their Petition that the decisions below emasculate the thrust of Section 301 of the Labor Management Relations Act. This contention, however, will not bear up under close scrutiny because the decision of the United States District Court for the Western District of Kentucky, as affirmed by the United States Court of Appeals for the Sixth Circuit, involves nothing more than the application of well established principles of Contract and Fraud Law to the facts presented.

For example, the Petitioners' Complaint alleges a conspiracy to fraudulently conceal certain facts from the Petitioners. Paragraph 15, Petitioners' Complaint, Respondents' Appendix, page 1(a). They have since modified this statement of their cause of action by arguing here that their cause of action is based upon fraudulent misrepresentations made to the Petitioners by the Respondents. It is, however, a fundamental principle of Fraud Law that to recover in an action for fraud, there must have detrimental reliance on the fraud. The rule is well stated in 37 CJS, *Fraud,* Section 8 at page 215:

> "The gist of an action based on fraud is fraud in defendant and damage to plaintiff; and its basic

elements are false representations by defendant and *reliance thereon by plaintiff to his damage.*" (Emphasis supplied.)

See also *Snyder* v. *Rhinehart,* 274 Ky. 274, 118 S. W. 2d 543 (1938).

Once this rule is recognized it becomes quickly evident that the Petitioners, as the lower courts held, have no cause of action in this case because the undisputed record discloses no reliance on their part. For example, immediately upon being informed that E & L was withdrawing from the Louisville area, Petitioners invoked the grievance procedure *claiming that there was an absorption.* That grievance reads in part as follows:

"On Monday, August 14, 1961, the stewards and committee spokesman for employees of E. & L. Transport of Kentucky were advised, effective August 21, 1961 E. & L. was abolishing their Driveaway Department. The Driveaway business will be *absorbed* by Dealers Transport Company. Article IV, Seniority, Section 4, 5 and 6 of our Agreement establishes an employee's rights in the instances of sales, transfer, lease and assignments of work covered by our Union Contract. It is my desire first to determine if under the circumstances of *absorbing* business and work that has been performed by E. & L. employees detrimentally affected by the abolishment of E. & L. Driveaway Board, further, if E. & L. employees have the right to stay with the business or traffic, should they not carry with them all seniority credits for any purposes accured during the tenture (sic) of their employment at E. & L." (Respondents' Appendix, page 5(a); Emphasis supplied.)

Similarly Petitioners alleged an absorption in their grievance to the Joint Committee. This was clearly contrary to and at variance with the alleged misrepresentations supposedly made to them. The Petitioners stated their grievance to the Joint Conference Committee in part as follows:

> "On Monday, Aug. 14, 1961 the stewards, committeemen and agent, spokesman for the bargaining unit employees of E. & L. Transport of Ky. were advised, effective August 21, 1961 E. & L. was abolishing the Driveaway Dept. of their operations. The Driveaway business will be *absorbed* by Dealers Transport Co., Article IV, Seniority, Section 4, 5, & 6 of our Agreement establishes employees rights in the instances of sales, transfer, lease, & assignments of work covered by our Union contract.
>
> "I am requesting that E. & L. Driveaway Drivers follow or stay with the business *absorbed* by Dealers Transport Co. and be placed on the Dealers Transport seniority list on a dovetailed basis.
>
> "I am also requesting that other E. & L. bargaining unit classifications be similar (sic) treated and that all E. & L. employees be compensated for any financial losses substained while awaiting a decision in this matter." (Respondents' Appendix, page 6(a); Emphasis supplied.)

It is evident, therefore, that at no stage of the proceedings did the Petitioners rely upon the alleged misrepresentations. The absorption contention, thus, was clearly before all the parties from the very onset of

the grievance procedure in Louisville. The Court below recognized that the Petitioners had not relied upon the alleged misrepresentations, and as a result, gave Judgment for the Respondents. Since reliance is an essential element of any fraud action, the decision below is in conformity with universally recognized legal concepts, and the Petition must be denied, if only for this reason.

In the face of this rather elementary proposition, the petitioners have developed another even more unsound theory of recovery. They seek relief here on the theory that but for the alleged misrepresentations (already demonstrated non-existent on the basis of the clear record before all of the Courts) the Dealers' employees would never have brought the *Humphrey* v. *Moore* litigation. The obverse of this is that but for the alleged misrepresentations (demonstrably non-existent) the Dealers' employees would have stood by quietly and allowed their jobs to be eliminated without taking any action to protect their vested interests. Aside from the complete irrationality of such reasoning, the record in *Humphrey* v. *Moore, supra,* completely invalidates these contentions. The very complaint which initiated the latter litigation demonstrated on its face that the grievances complained of in that action were entirely apart from the alleged misrepresentations. In his concurring Opinion in *Humphrey* v. *Moore, supra,* Mr. Justice Goldberg summarized the contentions of the complaint as follows:

> "(1) the Joint Committee exceeded its powers under the existing collective bargaining contract in making its decision dovetailing seniority lists,

and (2) the decision of the Committee was brought about by dishonest union conduct in breach of its duty of fair representation." (375 U. S. 335 at 352.)

As the lower courts readily saw, neither of the stated causes of action is in any way related to the alleged fraudulent misrepresentations. The Dealers employees contended that the Joint Committee exceeded its powers and that the Union breached its duty of fair representation. There is no mention anywhere in the proceedings of *Humphrey* v. *Moore* of any misrepresentations by the Respondents. In fact, this Court held that "no fraud is charged against the employer . . ." (375 U. S. 335 at 343). Thus, the lower court's finding that the alleged misrepresentations in no way caused, directly or indirectly, the litigation known today as *Humphrey* v. *Moore* is completely sustained by the record of *Humphrey* v. *Moore, supra,* and this Court's decision in that case.

Lastly, the Respondents argue here as they did unsuccessfully below, that it is incumbent upon the Respondents to show that the Petitioners suffered no damages as a result of the alleged fraudulent misrepresentations. In support of this novel theory they cite to this court the cases of *The Pennsylvania,* 19 Wall. (86 U. S. 125); *Wirtz* v. *Hotel Employees,* 391 U. S. 492; *NLRB* v. *Remington Rand, Inc.,* 94 F. 2d 862. The Petitioners neglect, however, to point out that in each of the cases fault had been established giving rise to a presumption that the tortfeasor caused the damages. In the instance case, the lower courts held that

even if the misrepresentations were made, they were discovered well in advance of the Joint Committee's hearing in Detroit and that "any possible adverse effects of said fraud could have had were cured by the full hearing that was held at Detroit and whose decision was found by the Supreme Court to be fair and acceptable." Opinion of United States District Court below, Petitioners' Appendix, page 13a. To see that this statement is a correct statement of holding in *Humphrey* v. *Moore, supra,* it is only necessary to refer to this court's opinion in that case.

> "Dealers employees had notice of the hearing, they were obviously aware that they were locked in a struggle for jobs and seniority with the E & L drivers, and three stewards representing them went to the hearing at union expense and were given every opportunity to state their position. Thus the issue is in reality a narrow one. *There was no substantial dispute about the facts concerning the nature of the transaction between the two companies.*" (Emphasis supplied.) .(375 U. S. 335 at 350.)

The Court went on to hold that "the decision of the Committee reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." The prior disclosure before the Joint Committee hearing fully cured any alleged misrepresentations and, therefore, the Petitioners misplace their reliance on the cases cited in their petition. It is clear, therefore, that there is no conflict in the circuits on this point nor are the decisions below contrary to any established principles of law.

II.

Damages Will Not Lie Against Respondent E & L Transport Company for Alleged Failure to Implement the Joint Commitee's Award or to Seek Dissolution of the Kentucky Court of Appeals' Injunction When It Had No Duty of Implementation Under the Award Nor Was It a Party to *Humphrey v. Moore*..

That the above is true is self-evident. The Joint Committee determined that Dealers was absorbing E & L's Louisville operations and that the E & L employment list be merged into the Dealers employment list. This holding entitled certain former E & L employees to be employed at Dealers. E & L and Dealers are separate corporate entities, however, and E & L had neither the power nor the obligation to insure compliance with the Award. As the contract stated, and the Supreme Court held, the Award of the Joint Committee was final and binding on the parties. Once the Award was rendered, the nature of the transaction had been determined, the future employment rights of the E & L employees had been fixed, and at this point E & L's responsibility in the matter ceased.

Nor can responsibility be placed on E & L for what transpired afterwards. As was noted previously in this Brief, the Petitioners neither relied upon nor suffered any damages from the alleged misrepresentations. In any case, the effects of any alleged misrepresentations were cured by full disclosure prior to the Joint Committee's hearing and vitiated by the Joint Committee's favorable ruling. The contention that the Dealers employees brought suit as a result of the

alleged misrepresentations has also been set to rest earlier in this Brief.

Petitioners clearly recognize that E & L had no responsibility in the *Humphrey* v. *Moore* litigation, either to support the Award by taking sides or seeking dissolution of the injunction. Nowhere in their Brief do they attempt to make this argument. Nor do they even seek to involve E & L on this point. E & L was *not* a party to *Humphrey* v *Moore* and had no standing in Court to argue for one side or another. Furthermore, the injunction was not directed at E & L but at Dealers and the Union. It is clear that as Judge Brooks held "E and L Transport Company . . . could not be charged with any negligence or liability for action or inaction in that litigation" (Petitioners' Appendix, page 8a).

The foregoing was self-evident to the Lower Court and is unchallenged in the Petitioners' Brief on this Appeal.

CONCLUSION.

For the foregoing reasons it is clear that the decisions below do not debilitate the provisions of Section 301 of the Labor Management Relations Act, nor violate any established principles of law. As a result, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

EDGAR A. ZINGMAN,
A. WALLACE GRAFTON, JR.,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,

Counsel for Defendant-Respondent
E & L Transport Company.

APPENDIX

COMPLAINT FOR SPECIFIC PERFORMANCE, DAMAGES AND OTHER RELIEF UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT
—Filed January 20, 1964.

COUNT ONE.

1. Plaintiffs, Walter Humphrey, Donald V. Malone, Robert Kalwat, and Marion A. Stacksteder, representatives of the class of employees of defendant E & L Transport Company, Louisville, Kentucky, are employees within the meaning of the Labor Management Relations Act, hereinafter called the Act, 61 Stat. 136, 29 U.S.C. § 141, et seq; 61 Stat. 161, 29 USC. § 142; 61 Stat. 137, 29 U.S.C. § 152.

2. The members of the aforesaid class have a common interest in the question of law and fact involved in this action. The class numbers over 100 and it is impracticable to name them all as parties plaintiff.

3. This action is brought pursuant to Section 301 of the Act, 61 Stat. 156, 29 U.S.C. § 185, to vindicate rights arising thereunder. That Section confers jurisdiction of this Court.

4. Defendant Dealers Transport Company is a corporation with offices at Fern Valley Road, Louisville, Jefferson County, Kentucky, and is incorporated in the State of Tennessee and operates a trucking business throughout the southern portion of the United States.

5. Defendant E & L Transport Company is a Michigan corporation, which, at relevant times herein, maintained a trucking terminal in Louisville, Kentucky.

6. Now and at all times material herein defendants Dealers and E & L are and have been engaged in commerce and operations affecting commerce within the meaning of the Act.

7. Defendants Dealers and E & L are employers within the meaning of this Act.

8. At all times material herein a collective bargaining contract covering a multi-employer unit of employees in the trucking industry has been in effect between National Truckaway and Driveaway Conference, a labor organization representing employees, and defendants Dealers and E & L. The trucking industry affects interstate commerce within the meaning of the Act and the aforesaid contract is governed by Section 301 of the Act.

9. Upon a grievance filed pursuant to the aforesaid contract by plaintiff, Walter Humphrey, on behalf of the employees of E & L Transport Company, the Automobile Transporters Joint Conference Committee, on or about October 18, 1961, issued a decision directing and requiring defendant Dealers to "sandwich in" employees of E & L Transport Company on Dealers' Louisville, Kentucky seniority lists. Said decision provided as follows:

> "By unanimous vote the Committee held that in accordance with Article 4 and particularly sub-sections 4 and 5 of the Automobile Carrier Truckaway Agreement, Automobile Carrier Driveaway Agreement and the Automobile Carrier City Delivery, Pull-Out, Mounting Service and Yard Agreement and Garage Rider, the Employees of E and L Transport Co. of Ky. and Dealers Transport Company at the Louisville, Kentucky Terminal shall be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein at Louisville, Kentucky (past practice on layoffs and recalls shall be maintained as in the past).
>
> "1. Presently constituted terminal seniority lists shall apply for seniority purposes recognizing that the first fifty (50) men who came from Memphis, Tennessee to Louisville, Kentucky maintained their original date of hire and took their proper place on the Louisville seniority boards of Dealers

Transport Company. Men subsequently who came to Louisville from Memphis went to the bottom of the Board at Dealers Transport Company and maintained their seniority for fringe benefits only.

"2. This shall be accomplished within thirty (30) days. Copies of this decision shall be posted on the bulletin boards at both companies."

10. On November 8, 1961, C. W. Moore, an employee of defendant Dealers, filed a complaint in the Jefferson Circuit Court Chancery Branch, First Division, seeking, *inter alia,* to enjoin defendant Dealers from "carrying into effect" the aforesaid decision. On November 29, 1961, Chief Justice Robert B. Bird of the Court of Appeals of Kentucky issued an order temporarily enjoining defendant dealers "from putting into effect" the aforesaid decision. On December 15, 1961, that Court made the temporary injunction permanent. Dealers did not oppose issuance of the injunction; did not take steps to secure its dissolution and defended it in the Supreme Court of the United States.

11. On January 6, 1964, the Supreme Court of the United States held that "the decision of the committee * * * is final and binding upon the parties, just as the contract says it is" and its implementation was *not* "properly enjoined" by the Kentucky Court of Appeals. *Humphrey, et al.* v. *Moore, et al.,* Nos. 17 and 18, Oct. Term, 1963, 32 L.W. 4055, 4060.

12. The condition required by the decision to have been established within thirty (30) days of its issuance were not accomplished within that time and have still not been accomplished.

13. In consequence of defendant Dealers' non-performance of the aforesaid final decision, the members of the plaintiff class have been and are being deprived of employment and emoluments of employment to which they are entitled by law.

COUNT TWO

14. Plaintiffs reallege and incorporate by reference, as if set out verbatim herein, the allegations of paragraphs 1 through 13 hereof.

15. Prior to October, 1961, defendants Dealers and E & L conspired to and did fraudulently conceal from plaintiffs' exclusive bargaining agent the agreement whereby E & L would sell to Dealers its "secondary" authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities. The purpose and effect of the aforesaid fraudulent concealment, was to defeat and prevent plaintiffs' exercise and enjoyment of employment rights arising from and under Article 5 of the contract referred to in paragraph 8 hereof.

16. Thereafter, defendant Dealers instigated, supported and assisted its own employees to resist, thwart and interfere with the exercise and enjoyment of plaintiffs' aforesaid rights pursuant to the decision referred to in paragraph 9 hereof.

17. Defendant Dealers acquiesced in and supported and failed and neglected to take steps legally open and available to it to set aside the injunction referred to in paragraph 10 hereof.

WHEREFORE, plaintiffs pray that this Court require defendant Dealers Transport Company:

(1) To specifically perform its obligations under the aforesaid decision, *nunc pro tunc* as of October 18, 1961;

(2) To pay damages to all members of the plaintiff class for loss of earning and other injuries suffered in consequence of defendant's failure to comply timely with the aforesaid decision;

(3) To pay plaintiffs' attorneys' fees and costs of this action; and

(4) Grant plaintiffs all other relief to which plaintiffs may be entitled, and require defendant E & L Transport Company:

(1) To pay damages to all members of the plaintiff class for loss of earnings and other injuries suffered in consequence of defendant's failure timely to comply with the aforesaid decision;

(2) To pay plaintiffs' attorneys' fees and the costs of this action; and

(3) Grant plaintiffs all other relief to which plaintiffs may be entitled.

Attorneys for Plaintiffs,

H. Solomon Horen,
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Louisville Kentucky,

Hughett & Hughett,
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Louisville 2, Kentucky,

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Hartford, Connecticut,

Mozart G. Ratner,
1411 K Street, N. W.,
Washington, D. C.

6(a)

OFFICIAL GRIEVANCE REPORT
FOR HEARING BY JOINT GRIEVANCE COMMITTEES

Local Union	89	Employer	E. & L. Transport Co.
Employee's Name	Ray O. Lewis	Address	P. O. Box 13007
Employee's Address	1137 Garden Row		Camp Taylor St.
		City	Louisville, Kentucky

Violation Alleged: (Contract)_____(Article)_____(Subsection)_____

State Grievance (attach necessary supporting material): On Monday, August 14, 1961, the stewards and committee, spokesman for employees of E. & L. Transport of Kentucky were advised, effective August 21, 1961 E. & L. was abolishing their Driveaway Department. The Driveaway business will be absorbed by Dealers Transport Company. Article IV, Seniority, Section 4, 5 and 6 of our Agreement establishes an employee's rights in the instances of sales, transfer, lease and assignments of work covered by our Union Contract. It is my desire first to determine if under the circumstances of absorbing business and work that has been performed by E. & L. employees detrimentally affected by the abolishment of E. & L. Driveaway Board, further, if E. & L. employees have the right to stay with the business or traffic, should they not carry with them all seniority credits for any purposes accrued during the tenture (sic) of their employment at E. & L.

Les Atterbury, Agent in Charge

Local Committee Action

Date:

Disposition:

Issue:

For Union Committee — For Operator Committee

Kentucky Joint Grievance Committee Action

No. 4565

Case No. #7 — Date of Hearing: 8/27/61

Disposition: Deadlocked to Detroit for interpretation.

/s/ Paul W. Priddy — /s/ D. E. Stovall

For Union Committee — For Operator Committee

Date referred to Central States Joint Area Committee_____

THIS FORM MUST BE USED IN FILING ALL GRIEVANCES

AUTOMOBILE TRANSPORTERS JOINT CONFERENCE COMMITTEE

2150 Guardian Building
Detroit 26, Michigan.
WOodward 2-8590

PRE-HEARING INFORMATION — DATE RECEIVED_____

CASE NO. 49

FROM THE UNION — For Committee's Use Only.

In order that the Committee Members may be familiar with the important features in this case, will you kindly fill out the following form as completely as possible. The information submitted herein will be treated as a preliminary general statement of the Union's position.*

1. UNION NAME General Drivers Local #89
   PARTICULAR GRIEVANCE Les Atterbury
   ADDRESS 3813 Taylor Boulevard, Louisville 15, Kentucky
2. NAME OF AGENT HANDLING
3. A. NAME OF EMPLOYEE FILING COMPLAINT Ray O. Lewis
   B. CLASSIFICATION OF WORK Driveaway Driver
   C. DATE OF EMPLOYMENT 9/24/52
4. NAME OF CARRIER INVOLVED E. & L. Transport Company
   ADDRESS P. O. Box 13007 Camp Taylor Station, Louisville, Ky.
5. CIRCUMSTANCES OF THE DISPUTE (CHECK ONE)
   - A. WARNING NOTICE ☐
   - B. DISCIPLINARY TIME OFF ☐
   - C. DISCHARGE ☐
   - D. BACK PAY CLAIM ☒
   - E. OTHERS ☒
6. Date on which Company took action against employee August 21, 1961
7. Indicate that part of contract or Uniform Rules and Regulations which Employer claims employee violated Article IV, Seniority, Section 4, 5, & 6.
8. Date on which alleged violation took place August 21, 1961
9. Date on which grievance was first taken up with Management 8-14-1961

10. Exact amount of back pay, if any, claimed by aggrieved employee

11. UNION POSITION (Also include brief resume of pertinent facts—use back of sheet if necessary)

On Monday, Aug. 14, 1961 the stewards committeemen and agent, spokesman for the bargaining units employees of E. & L. Transport of Ky. were advised, effective August 21, 1961 E. & L. was abolishing the Driveaway Dept. of their operations. The Driveaway business will be absorbed by Dealers Transport Co., Article IV, Seniority, Sections 4, 5, & 6 of our Agreement establishes employees rights in the instances of sales, transfer, lease, & assignments of work covered by our Union contract.

I am requesting that E. & L. Driveaway Drivers follow or stay with the business absorbed by Dealers Transport Co. and be placed on the Dealers Transport seniority list on a dovetailed basis.

I am also requesting that other E. & L. bargaining unit classifications be similar treated and that all E. & L. employees be compensated for any financial losses substained while awaiting a decision in this matter.

12. Date on which case heard by LOCAL JOINT COMMITTEE August 23, 1961

*PREPARE IN TRIPLICATE
1st copy—Mail to Committee
2nd copy—Company Involved
3rd copy—Local Union File

/s/ Paul W. Priddy, Pres.
(FOR THE UNION)

DATE 9/2/61

SUPREME COURT, U. S.

JUN 13 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1379

WALTER HUMPHREY, DONALD V. MALONE, ROBERT KALWAT and MARION A. SACKSTEDER, *Petitioners,*

v.

DEALERS TRANSPORT COMPANY

and

E & L TRANSPORT COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY MEMORANDUM FOR PETITIONERS

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Attorneys for Petitioners

June 13, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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---

REPLY MEMORANDUM FOR PETITIONERS

---

1. Respondents continue to misstate the essential predicate of this action. They overlook that the employers' misrepresentations to the Union officials formed the basis of the officials' advice, not only to petitioners, but also to their competitors for jobs, Dealer's employees (Pet., pp. 4, 5, 7-8). While petitioners did not rely on that advice (E & L Br., pp. 11-14, 16, 17; Dealers Br., pp. 6-7), *Dealers' employees did,* and so asserted in their complaint in *Humphrey* v. *Moore* (See 375 U.S. 335 at 340; Pet., p. 5).

Nothing in the law of fraud or of contract even remotely suggests that a party is immune for fraudulent misrepresentations which induce one beneficiary (Dealers' employees) to take action detrimental to another (E & L's employees). Certainly, that cannot be the law of Section 301, if the multilateral relationships characteristic of association-wide collective bargaining contracts (Pet., p. 4), are to enjoy the protection of the inherent obligation of good faith and fair dealing. *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 572 (Brennan, J., concurring.). Respondent Dealers simply ignores this historic contractual obligation (Pet., pp. 11-13) in arguing that its misrepresentation to the Union, designed to thwart enforcement of the contract, is only an unfair labor practice (Dealers Br., p. 5).

2. Respondent E & L's defense of the reasoning below (E & L Br. p. 14) that merely because Dealers' employees and E & L's employees were competitors for jobs, it must be assumed that the former would have sued to enjoin the award if the Companies had disclosed all the facts truthfully and fully in response to the Union's inquiry, is both factually and legally unsound. In the first place, the assumption is contrary to common experience. Moreover, here, specifically, full disclosure would not only have destroyed any basis for attack upon the Union but also the predicate for attack on the Joint Committee's authority on the theory that there was no "absorption" (See 375 U.S. at 346; Pet. p. 8). In any event, the assumption is legally untenable because it would immunize fraudulent misrepresentation in breach of contract wherever the employer's object is to advantage one group of employees over a competing group. Finally, even if the assumption were rational, it could not serve, as it did

here, to foreclose plaintiffs from trial on the issue of causation. See, in addition to the cases cited at Pet., pp. 13-17, *Zenith Radio Corp.* v. *Hazeltine Corp.*, 89 S. Ct. 1562, 1576-1577 (May 19, 1969).[1]

3. While respondent Dealers purported to assume a "neutral" position in the *Moore* litigation, it was not a mere *disinterested* stakeholder, as was the carrier in *Chicago, B. & O. R. Co.* v. *Fowler,* 224 Mo. App. 736, 27 S.W. 2d 72 (1930), upon which Dealers exclusively relies (Dealers Br., p. 12). This is shown by Dealers' agreement with E & L that Dealers would retain its own employees (Pet., p. 7). *Fowler* itself recognizes that, in cases like the present, "neutrality" by the obligor is not a defense but a breach of contract. Thus, the decision below is clearly in conflict with settled contract law. (Pet. p. 20).

4. Respondent Dealers also argues, although the courts below did not agree, that petitioners were bound to seek through the grievance procedure recovery of damages resulting from its noncompliance with the arbitration award. But the contract made that award "final and binding" upon all parties. *Humphrey* v. *Moore*, 375 U.S. at 351. Thus, it became the duty of the courts under Section 301 to remedy noncompliance with the award; this was the precise holding in *Drivers Local Union* v. *Riss,* 372 U.S. 517.

Nothing in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, is to the contrary; rather, it is Dealers' position

---

[1] "The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed." *Zenith, supra,* at 1577. Similarly, plaintiffs here were entitled to a trial at which the *jury* would have the opportunity to infer from the circumstantial evidence that the necessary causal relationship between defendants' fraud and the injunction in *Moore* existed.

which would destroy the efficacy of the grievance procedure which *Maddox* was designed to foster. For under respondent's approach, the underlying contractual right would never be ripe for judicial enforcement, thereby frustrating the primary objective of Section 301, to promote adherence to "final and binding" contractual obligations by judicial enforcement. Dealers thus contends for "doctrinaire application of the exhaustion rule [which] would defeat the overall purpose of federal labor relations policy" (cf. *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 329-330). Indeed, by subjecting employees to an infinite series of grievance proceedings without ultimate recourse to judicial relief, the argument goes far beyond *Maddox*, raising in acute form the constitutional objections suggested by Mr. Justice Black's dissent in that case.

5. Respondents assert that the courts below properly read *Humphrey* v. *Moore* as exculpating them from the charge of fraudulent misrepresentation. But no such charge was made or litigated there, and the issue was irrelevant because the theory of *that* complaint was that *the Union* was guilty of fraud or unfair dealing by its erroneous assurances to Dealers' employees. Proof that the Union acted upon misinformation supplied by the Company exculpated the Union from *that* charge; but it did not and could not exculpate the Company from the charge, which is the basis of *this* suit, that it fraudulently misled the Union. The District Court's *second*[2] interpretation of *Humphrey* v. *Moore*

[2] The District Court originally correctly rejected the *res judicata* argument (Pet. App., p. 5a).

Since the present plaintiffs were defendants in *Humphrey* v. *Moore*, that suit bars them from asserting only such matters as were compulsory counterclaims. See Rule 13(a) of the Federal